A SHORT

ACCOUNT

OF THE

Authorities in LAW,

UPON WHICH

JUDGEMENT

Was given in

Sir *EDW. HALES*

HIS

CASE.

WRITTEN BY

Sir *EDW. HERBERT*,
Chief Justice of the Common Pleas,
In Vindication of HIMSELF.

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HAving been call'd to a place of Judicature in difficult times, after my moſt ſincere Reſolutions and uttermoſt Endeavours of diſcharging the Duty of that place with a good Conſcience, having yet had the hard Fortune to fall under the greateſt Infamy and Reproach that is poſſible for any man to lie under, of Perjury and Breach of Truſt, in giving a Judgment in Sir *Edward Hales*

his Case contrary to Law, and contrary to my Knowledg and Opinion (for that only can make it Criminal;) and which, they say, tends to the Subversion of all our Laws; contrary to the Oath that every Judge takes, and to that high Trust repos'd in him to judge, to the best of his understanding, according to Law: Although I cannot hope to wipe off that universal ill Impression that the Malice of some People who understand the nature of this Case very well, has made upon most men who do not understand it; yet in order to clear my self to all just and dis-interested Persons who are only my Enemies by mistake, I think my self obliged to give some short Account of that Judgment, and the Grounds upon which it was given; and this I will do, not by making an elaborate and legal Argument, to make out by Reasons of my own, that the Judgment then given is consonant to Law, which whether it be or no, is like to be considered in Parliament, and to whose determination I shall as intirely and as chearfully submit as any other Person in the Nation: But I shall set down, not all the variety of Cases that we meet with in our Books touching the Kings Power of Dispensing with Acts of Parliament, for that would swell this Paper to an unreasonable length, and discourage many from reading any part of it; but only some few of the chiefest and plainest Authorities in Law,

upon

upon which the Reſolution in the Caſe of Sir *Edw. Hales* was grounded. I ſhall not only cite the Books and Pages where thoſe Caſes are to be found, but tranſcribe the very Words, that every body may be convinced, that if we were in a Miſtake, it was no Wilful Miſtake, but that we had the Authority of former Judgments given by great Men that went before us (and for which they were never queſtion'd) to lead us into it.

The Caſe (for I muſt ſtate it upon my Memory, not having any Copy of the Record by me) was ſhortly this.

An Action Popular was brought againſt Sir *Edw. Hales*, upon the Statute 25. *Car.* 2. c. 2. for the Penalty of 500*l.* wherein the *Plaintiff* declares, That whereas it was provided by the Statute, *&c.* ſetting forth the Statute: Notwithſtanding which, the *Defendant* having a Commiſſion to ſerve the King as a Colonel of Foot, and not having received the Sacrament, nor taken the Oaths and Teſts, *&c.* within the times preſcribed by the Act, and after the times expired wherein he ought to have received the Sacrament and taken the Oaths and Teſts as aforeſaid; he did execute the ſaid Office, and continued to act by colour of the ſaid Commiſſion, of which he was Indicted and Convicted at the Aſſizes in *Kent*, *&c.* whereby the Action accrues to the *Plaintiff* for the Penalty of 500*l.* The *Defendant*

fendant pleads that before the times expired, &c. he had a Diſpenſation under the Broad Seal to act *Non obſtante* that Statute.

To which the *Plaintiff* demurres.

And Judgment was given for the *Defendant* that his Plea was good.

And firſt it will be neceſſary to ſhew what the Nature of this Diſpenſing Power is, which is warranted by our Judgment; and that will beſt appear by the Definition of it which is given in the 11. Report of my Lord *Coke*, p. 88. in the Caſe of Monopolies. *Diſpenſatio mali prohibiti eſt de jure Domino Regi conceſſa propter impoſſibilitatem prævidendi de omnibus particularibus; & diſpenſatio eſt mali prohibiti provida relaxatio, utilitate ceu neceſſitate penſatâ.* "For true it is (ſays the Book) that inaſmuch as "an Act of Parliament, which generally prohi- "bits any thing upon a Penalty that is Popular, or "only given to the King, may be inconvenient to "divers particular Perſons, in reſpect of perſon, "time, or place; for this purpoſe the Law gives "a power to the King to Diſpenſe with particular "Perſons. And in the Seventh Report, pag. 63. in the Caſe of Penal Statutes, which was the opinion of all the Judges of *England*, 2. *Jacobi*, It is reſolved, That the King may Diſpenſe with any particular Perſon, that he ſhall not incur the Penalty of the Statute, tho it be an Act made *Pro bono publi*,

lico, and that this is a Truſt and Confidence inſeparably annex'd to the Royal Perſon of the King: I cite theſe two firſt Caſes chiefly to ſhew that a Diſpenſation in its nature is particular, and given to particular Perſons by Name; which is all the Power that is attributed to the King by our Judgment. And this I mention becauſe of an unreaſonable miſtake of moſt People that talk of the Diſpenſing Power, as tho the Kings Declaration of *Liberty of Conſcience*, whereby all the Laws that concern Religion are at once totally ſuſpended and laid aſleep, were warranted by it: Let that Declaration ſtand or fall upon its own bottom, I am ſure the Caſe I am now ſpeaking of has nothing to do with it. And having by theſe Caſes cleared the nature of all Diſpenſations, which are always granted to particular Perſons (as Sir *Edw. Hales* his was in our Caſe, who was the firſt, and I think the only Perſon who then had ſuch a Diſpenſation,) I ſhall now cite ſome of the chief Authorities upon which our Judgment was given in that Caſe; and the firſt and great Caſe that I cite, wherein the Kings Diſpenſing Power is deſcribed and limited, is in the Year-Book of *Hen.7.* fol. 11. & *H.7.* f. 12. in theſe words, "There is a diverſity (ſays the Book) "between *malum prohibitum* and *malum in ſe*, as "a Statute forbids any man to Coin Mony, and "if he does, he ſhall be hanged; this is *malum pro-*

"*hibitum*,

"*hibitum*, for before the Statute, Coining Mony "was Lawful; but now it is not so, and there- "fore the King can Dispense with it. So if a "Man Ship Wooll in any place but *Calice*, it is "*malum prohibitum*, because it is prohibited by Act "of Parliament, and the King can Dispense with "it, and so in like cases: but that which is *malum* "*in se*, the King nor no other person can dispense "with, as if the King would give a Man power "to kill another, or License one to make a Nu- "sance in a High-way, this were void; and yet "the King can pardon these things when they are "done. These are the very words of that Book; and my Lord *Vaughan* discoursing of, and explaining this case in the Case of *Thomas* and *Sorrell* in his Reports, p. 333. First, shews how a Dispensation differs from a Pardon. For a Dispensation does *jus dare*, and makes the thing prohibited (to all others) lawful to be done by him that has it: And therefore the King cannot dispense with *mala in se*, because they never were, and can never be made lawful; but even these, says the Year-book, may be pardoned after they are done.

From these Cases, results this plain Syllogism. Whatever is not prohibited by the Law of God, but was lawful before any Act of Parliament made to forbid it, the King, by his Dispensation granted to a particular person, may make lawful again;

again; to that perſon who has ſuch Diſpenſation, though it continues unlawful to every body elſe.

But to execute any Office without taking the Oaths and the Teſts antecedent to any Acts of Parliament made to forbid it, was lawful.

Therefore the Diſpenſation granted to Sir *Edward Hales* did make it lawful for him to do ſo, though it continued unlawful for any body elſe.

In this Argument the premiſes are none of our own, we have them out of our Law-books; and the Authority of thoſe books have never yet been queſtioned. I appeal then to any indifferent perſon, whether it can be Criminal in Judges, to draw a neceſſary Concluſion from Premiſes and Book-Caſes that have been taken for Law for ſo many Ages together.

The next great Caſe is the Reſolution of all the Judges of *England*, in the 2. of *Henr.* 7. in the Exchequer Chamber, upon the Kings Power of Diſpenſing with the Statute of 23 *Henr.* 6. cap. 8. *That no Man ſhould be Sheriff for above one Year.* The recital in the preamble, and the whole purview, if compared with our Statute of 25 *Car.* 2. cap. 2. equals it in every particular, and in ſome goes beyond it: for the miſchiefs recited in this latter Statute are only in theſe words, *for preventing dangers which may happen from Popiſh Recuſants, and quieting the minds of his Majeſties good Subjects.*

The Cauſe of making the Statute of 23 *Hen. 6.* is for preventing the Importable damage of the King and his People, Perjury, Manſlaughter and great Oppreſſion. The Purview Enacts,

1. *That no Man ſhall be Sheriff for above a Year.*

2. *That all Letters Patents made for Years or Lives, ſhall be void.*

3. *That no* Non obſtante *ſhall make them good,* (which ſhews that the Parliament thought the King could otherwiſe have diſpens'd with this Act by a *Non obſtante.*)

4. *Whoever acts by colour of ſuch Letters Patents, ſhall forfeit* 200l.

5. *He ſhall be utterly diſabled to bear the Office of Sheriff in any County of* England.

6. *That every Pardon for ſuch offence ſhall be void.*

Notwithſtanding all this, it was adjudged in that Caſe before-cited by all the Judges of *England* (who were at that time as learned as ever ſate upon the Bench,) I ſay it was adjudged by all the Judges in the Exchequer-Chamber, that the Kings Diſpenſation with that Statute was good.

Having then this Caſe before us, if we ſhould have judged the Diſpenſation not good in Sir *Edward Hales*'s Caſe, it muſt have been upon one of theſe two grounds: that is, either,

1. In

1. In the first place, we must have found some difference between the Kings power in that Case, and in this, which I confess, after the [illegible]est inquiry, does not appear to me, and I wish any man would shew me any such difference if he can: or else,

2. We must have adjudged that Solemn Resolution given in the Exchequer-Chamber by all the Judges of *England* so long ago, and which has been taken for good Law [illegible] ever since, we must adjudge no Law: whereas the known Rule is, that after any point of Law has been solemnly setled in the Exchequer Chamber by all the Judges, we never suffer it to be disputed or drawn in question again.

But our Enemies seeing the force of this Argument have had the Confidence to say, that that point is not resolved in that Case, they might with as much modesty affirm, *Thou shalt not bear false witness against thy Neighbour*, to be none of the Ten Commandments; we can only reply in this case as in that, that if we have eyes to read, and common sense to judge, it is there resolved. Indeed there is another point about the Sheriffs passing his Accounts, which the Judges were divided in: but in the point of the Dispensation they all agreed, or else that other point could never have come in question.

But to put this beyond all Controverſie, we have two things to offer.

1. [illegible], That it has been cited as adjudg'd in ſeveral books of great Authority.

2. Secondly, It has been the conſtant practice to have ſuch Diſpenſations in all Kings Reigns ever ſince that Reſolution.

As to the firſt, Though I might cite many books, yet I will only cite three or four of the cleareſt and greateſt Authorities: and the firſt ſhall be *Fitzherbert*, in his Abridgement of this very Caſe, *Tit. Grant.* 33. who lived near this time, and could not eaſily be miſtaken in the ſenſe of the Year-book; *The Patent*, ſays he, was adjudged good by all the Juſtices; *but the Statute ſays expreſly it ſhall be void*, therefore it is only made good by the Kings Diſpenſing.

2. Next to him ſhall be *Plowden*, who, as all Lawyers will confeſs is as little like to be miſtaken in the ſenſe of the Year-books as any Reporter we have; and he in his *Commentaries*, p. 502. in the Caſe between *Greendon* and the Biſhop of *Lincoln*; after citing the Caſe both out of the Year-book, and out of *Fitzherbert*'s Abridgment, has theſe words where the Statute was, *That the Kings Grant to any Man to be Sheriff of any County for longer time than a Year ſhall be void, notwithſtanding any Clauſe of* Non obſtante *to be put in-*

to

to the Patent, there it is held, *that the Kings Grant to the Earl of* Northumberland, *to be Sheriff during life must have a Clause of* Non obstante, *because of the precise words of the Statute before mentioned; and with such a Clause of* Non obstante, *the Patent to the* Earl *was good.*

3. Next is my Lord *Coke*, who asserts the Kings Prerogative touching this matter in much higher terms than we would presume to do, in giving judgment in Sir *Edward Hales* his Case, for in his Twelfth Report, pag. 18. he has these words. *No Act can bind the King from any Prerogative which is sole and inseparable to his person, but that he may dispense with it by a* Non obstante, *as a Sovereign Power to command any of his Subjects to serve him for the publick weal; and this solely and inseparably is annext to his Person: and this Royal power cannot be restrained by any Act of Parliament, neither in* Thesi *nor in* Hypothesi, *but that the King by his Royal Prerogative may dispense with it: For upon the Commandment of the King, and Obedience of the Subject does his Government consist: as it is provided by the Statue of* 23 Hen. 6. cap. 8. *That all Patents made or to be made of any Office of a Sheriff*, &c. *for term of Years for life in Fee-simple or intail, are void and of none effect, any Clause or Paroll* de non obstante, *put or to be put into such Patents to be made notwithstanding: And further whosoever shall take*

upon

upon him or them, to accept or occupy such Office of Sheriff, by Vertue of such Grants or Patents shall stand perpetually disabled to be, or bear the Office of Sheriff within any County of England; *by the same Authority, and notwithstanding that by this Act, First, The Patent is first made void. Secondly, The King is restrained to grant* Non obstante. *Thirdly, The Grantee disabled to take the Office, yet the King by his Royal Sovereign Power of Commanding, may Command by his Patent (for such causes, as he in his wisdom doth think meet and profitable for himself and the Common-Wealth, of which he himself is solely Judge) to serve him and the weal publick as Sheriff of such a County for years, or for life, &c. And so it was resolved by all the Justices of* England *in the* Exchequer Chamber, 2 H. 7. *And after some other cases to this point of the Kings Prerogative, he has this farther* (says he) *see* 4 Hen. 4. cap. 31. *In which it is Ordained that no* Welshman *be* Justice, Chamberlain, Treasurer, Sheriff, Steward, Constable *of a Castle,* Escheator, Coroner *or chief* Forester, *nor other Officer whatsoever, nor* Keeper *of* Records, *&c. in any part of* Wales, *notwithstanding any Patent made to the contrary, with Clause of* Non obstante licet sit Wallicus natus: *and yet without question the King may grant with a* Non obstante. Thus far that Book, and I have transcribed the Book at large, that every body may see that the Kings Power of Dispensing

penſing with ſuch Acts of Parliament as reſtrain his granting Offices, ſtands upon a peculiar reaſon beſides the general one; upon which his power of Diſpenſing with other Penal Laws is founded. And that if this be a pernicious Opinion, we are not to ſuffer as the firſt Authors of it. But leſt it ſhould be Objected, that this is my Lord *Cokes* ſingle Opinion; or that the twelfth Report is not of ſo great Authority as the reſt of his Reports are: The ſame is Reſolved by all the Judges of *England*, (if my Lord *Coke* be a faithful Reporter) in *Calvin's* Caſe in the ſeventh Report, p. 14. in theſe words: *Every Subject is by his Natural Allegiance bound to ſerve and obey his Sovereign*, &c. *It is Enacted by the Parliament of* 23 H. 6. *That no Man ſhould ſerve the King as Sheriff of any County above one Year, and that notwithſtanding any Clauſe of* Non obſtante *to the contrary; that is to ſay, Notwithſtanding that the King ſhould expreſly Diſpenſe with the ſaid Act; howbeit it is agreed* 2 H. 7. *that againſt the Expreſs Purview of that Act, the King may by a ſpecial* Non obſtante *Diſpenſe with that Act*, For that the Act could not bar the King of the ſervice of his Subject, *which the Law of Nature did give unto him.* This is Reported (unleſs my Lord *Coke* had a mind to deceive the ſucceeding Judges, and draw them in, to give pernicious Opinions) as the ſenſe of all the Judges of *England* in King *James* his time, in the Exchequer Chamber. And

And now I would ask, theſe Caſes thus ſolemnly reſolved, are they Law? Or are they not? If it ſhall be ſaid that they are not Law? What Foundation have the Judges to ſtand upon? Or what certain Meaſures can they take in giving Judgment, either between the King and his Subjects, or between Party and Party: If ſo many ſolemn Reſolutions by all the Judges of *England* in the *Exchequer* Chamber, are not to be relied upon? If they are Law; then I appeal to all mankind whether our Caſe does not come up in every tittle to the reaſon of thoſe Reſolutions: Whether the Act. of 25. *Car.* 2. do not bar the King of the ſervice of ſome of his Subjects; and whether therefore for great Reaſons, and in particular Caſes he may not diſpenſe with it.

But beſides the Authority of this Caſe, we have the conſtant practice, that this Statute of Sheriffs has been conſtantly diſpenſed with ever ſince it was made; and if thoſe Diſpenſations weer not good, then all perſons Convicted upon Indictments found by *Grand Juries*, returned by ſuch Sheriffs, are illegally Attainted; then all Pannels of Juries returned, and other Proceſs executed in Civil Cauſes, by ſuch Sheriffs, was altogether erroneous, and it is ſtrange that no body in ſo long a time ſhould hit that blot.

Obj.

Obj. The only Objection, that I hear, is made to this, by eminent men of our Profeſſion, (who freely acknowledge the Authority of theſe Caſes, and the Reſolution in them, that no Act of Parliament can debar the King of the ſervice of his Subjects, which the Law of Nature gives him, to be good Law;) is this, that ſay they, It is not the Act of Parliament that debars the King of the ſervice of his Subjects in this Caſe, but it is the default of thoſe Subjects, who will not qualifie themſelves for his ſervice, by doing thoſe things that the Statute requires. But for a full and plain Anſwer to this, I ſay,

1. Firſt, We are not now conſidering theſe Grants of Offices, as they are beneficial to the Subjects, on whom they are conferred, but as the King has an intereſt in the ſervice of thoſe Subjects; and it is a known Rule in Law, that among common perſons, no man ſhall ſuffer by the default of another; much leſs ſhall the King be prejudic'd by the default of any of his people.

2. But Secondly, Pray where is the difference between an Act of Parliaments barring the King directly of the ſervice of his Subject, and doing of it by neceſſary and inevitable Conſequence? As, if an Act of Parliament were made that no Man that is Lame or Deaf ſhould ſerve

the King in any Office, though they were otherwiſe well qualified for it; the King were as effectually debarred of the ſervice of ſuch Subjects, as though they had been expreſſed by Name. I know it will be ſaid, that theſe are Natural defects which the Subjects cannot help, but the others are Wilful Impediments, that may be removed, if they pleaſe.

But to prove that this is not ſo: I ask, Whether when the Act requires Declarations and Subſcriptions to be made, it ſhould be done *contrary* to a Mans Opinion, or *according* to it? Certainly no Man will ſay, *contrary* to a Mans Opinion, for that would be high Diſſimulation, and more elude the ends of the Act, than not doing it at all. If then it muſt be done *according* to a Mans opinion, it is no more in any Mans power to change his Opinion, than to cure himſelf of Deafneſs or Lameneſs. Every Man believes, not becauſe he will, but becauſe he muſt believe. Error is a Diſeaſe of the Mind, as much as thoſe beforementioned are of the Body. It is true, a Man may ſeek for Inſtruction, and uſe all means to be better informed; and ſo may a Man, in the other Caſe, try all proper Remedies to Cure his Diſtempers; but proper Remedies do not always effect the Cure, and often when they do, there is much time taken up in the

the Operation: and the King, who is in no default at all, loſes the ſervice of his Subject in the mean time: And if this Prerogative be, as my Lord *Coke* ſays, *Proprium quarto modo*, and that it belongs to our Kings, as he ſays, *Omni, ſoli & ſemper*: The King can be no more debarred of the ſervice of his Subject for a month, or a year, than he can be debarred of it for ever; eſpecially ſince in that month, or year, may happen ſuch occaſions, which afterwards during the joint Lives, of the King that is to command, and of the Subject to be commanded, may probably never happen again.

Many other Caſes of Acts of Parliament might be cited, as 8. *R.* 2. 2. That no Man ſhould go Judge of Aſſize into his own Country. And 10. *E.* 3. 3. That whoever has a Pardon of Felony, ſhall find Sureties of the Good Behaviour, or his Pardon ſhall be void; which Statutes have been conſtantly Diſpenſed with ever ſince they were made: but I reſolve not to heap up all the Caſes of Diſpenſations, but to confine my ſelf to thoſe that were, as they are before cited, the principal ground of our giving Judgment in Sir *E. Hales* his Caſe. Only after I have anſwered ſome Objections, I have two Authorities more to offer, which I take to be of greateſt weight in this Caſe, and that is two Conceſſions of the Com-

mons of *England* in Parliament, acknowledging this power of Diſpenſing to be in the King.

But firſt, To anſwer an Objection or two that I hear is made:

1. *Obj.* This Act was made *pro bono publico*, and in the Caſe before-cited, of 11. *H.* 7. The King cannot Diſpenſe with a common Nuſance; and this Caſe Diſpenſed with, would be as bad as Diſpenſing with a common Nuſance.

Anſw. Tho this will receive an eaſie Anſwer, yet I ſhall avoid giving it in words or reaſons of my own (as I do all along, becauſe I know they would be ſuſpected and miſconſtrued) but in the words of my Lord *Vaughan*; whom I cite the oftener, becauſe every body remembers him, and it is very well known, he was never guilty of ſtraining the King's Prerogative too high. In *Thomas* and *Sorrel's* Caſe: The chief Reaſon why the King can't diſpenſe with a publick Nuſance, is ſaid by him to be, becauſe every particular perſon that has received damage by it, may have his Action, which the King cannot bar. *Nor ſee I any reaſon*, ſays he, page 335. *Why the King may not Diſpenſe with thoſe Nuſances by which no Man has right to a particular Action, as well as he may with any other offence againſt a Penal Law, by which no third perſon has cauſe of Action: from whence it follows, that if an Act of Parliament call*

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an Offence a Nuſance, from whence no particular damage can ariſe to a particular perſon to have his Action, the King may Diſpenſe with ſuch a nominal Nuſance.

Now to apply this to our Caſe, for exerciſing an Office without taking the Teſt, no particular perſon can have an Action, becauſe no particular perſon can have any Damage by it, (for an Action, as an Informer, is not meant, that being the Caſe of all popular Statutes) and therefore the King may Diſpenſe with it, before the Action brought: and in page 341. he explains this very well. *No Offence*, ſays he, *againſt a Penal Law could be Diſpenſed with, if the reaſon of not Diſpenſing, were becauſe the Offence, is* contra bonum Publicum, *for all Offences againſt Penal Laws are ſuch*, p. 342. *though ſuch Laws are* pro bono publico, *they are not Laws* pro bono ſingulorum Populi (which are the Laws which the King cannot Diſpenſe with, as will appear at large in the Conceſſion of the Commons, 3 *Caroli*, which I will cite by and by) *but* pro bono Populi complicati, *as the King in his Diſcretion ſhall think fit to order them for the good of the whole. In this Notion the Eſtate of every* Pater-familias *may be ſaid to be* pro bono communi *of his Family, which yet is but at his diſcretion, and management of it; and they have no Intereſt in it, but have Benefit by it.*

Obj.

Obj. 2. But it is again Objected, that in Statutes that are *pro bono Publico*, in a leſs degree, the King may Diſpenſe. But this Statute was ſo highly neceſſary for the Publick, that it could not be Diſpenſed with.

Anſw. To which my Lord *Vaughan* Anſwers in the Caſe before-cited. *p.* 344.

1. *All Penal Laws, when made, and in force, are equally neceſſary, and in things neceſſary, there is no gradation of more or leſs neceſſary.*

2. *If any Penal Laws were poſſibly leſs Diſpenſible than others, thoſe capitally Penal were leſs Diſpenſible than thoſe leſs Penal. But it is not ſo: for Coining Money of right Alloy in imitation of the Kings Coin, is capitally Penal without licence, but it may be licenſed, &c. It is capital to multiply Gold or Silver, by the Statute* 5 Hen. 4. c. 4. *but may be licenſed, as was done to* John Faceby, tempore *H.* 6. The Diſpenſation with a *Non obſtante* to that Statute may be ſeen, *Coke, Placita Coronæ* fol. 74. cap. 20.

Obj. 3. But if the King have a Power to diſpenſe with one, he may diſpenſe with twenty, with an hundred, and ſo the Statute may become of little force.

Anſw. From the Abuſe of a thing to draw an Argument againſt the thing it ſelf, is no Conſequence at all; it is, as is reſolved in the Caſes above cited, a high Truſt repoſed in the King, and if the

the King will violate his Truſt, there is never a one of his Prerogatives but may be abuſed, to the ruin of his People. To inſtance in one or two.

1. Every body will grant, that the King can pardon Murther and Robbery, yet if he ſhould pardon every Murther and every Robbery that is committed, it were better to live with the Cannibals in *America*, than in our Native Country; and the Human Laws that are made to puniſh thoſe Crimes, would be rendered of as ſmall force and effect, as it is objected the Law in our Caſe would be by frequent Diſpenſations.

2. There is no doubt, but the King may create any Man a Peer of *England*, and thereby give him a Vote in Parliament; yet if the King ſhould abuſe this Power ſo far as to create ten thouſand Peers, or confer this Honor upon every body that asks it, no doubt it were a total Deſtruction of the Legiſlative Power of the Nation. And yet in either of theſe Caſes, (or in any other branch of the Kings Prerogative) if the Judges ſhould judge the King had ſuch a Prerogative, it were an unreaſonable Objection, to ſay, Theſe Prerogatives may be abuſed; *Ergo* the Judges have given a pernicious Judgment.

When we were to give Judgment in Sir *Edward Hales* his Caſe, we could neither know, nor hinder if we did, any ill uſe the King might make of this Power, we were only to ſay upon our Oaths, whether

whether the King had ſuch a Power or no, and for that we had the great Authorities above-cited, and two much greater than thoſe; I mean two ſeveral clear Conceſſions of all the Commons of *England* in Parliament aſſembled, of this Diſpenſing Power to be in the King; and that not in a ſubmiſs complying temper, but when they were in a high Debate with the Crown (eſpecially in the latter Caſe) about the Violation of other Laws.

And the firſt of theſe is *Rot. Parl.* 1. *Hen.* 5. *n.* 15. and it is printed in *Rolls* Second Abridgment, Tit. *Prerogative* 180. the Record is in theſe words, *The Commons pray that the Statutes for Voiding of Aliens out of the Kingdom, may be kept and executed: To which the King agrees, ſaving his Prerogative, that he may Diſpenſe with whom he pleaſes; and upon this the Commons anſwered, that their intent was no other, nor never ſhall be by the Grace of God.* There were as great apprehenſions of Dangers and Inconveniencies from Aliens then, as there is from Roman Catholicks now.

And afterwards, in the ſame Parliament, [*Rot. Parl.* 1. *Hen.* 5. *n.* 22.] when the Commons pray that the Statutes of Proviſors, Statutes of the ſame Nature with this in our Caſe; (for they were made againſt the Court of *Rome's* encroaching Juriſdiction in *England*;) I ſay when they make the like Prayer, that theſe may be put in execution, being admo-

admoniſhed by the Kings Anſwer in the former Caſe, they themſelves inſert in their very Prayer, a Saving for this Prerogative of the Kings, and then the King agrees to it.

But the plaineſt Conceſſion of the Commons of *England* aſſembled in Parliament, was that 3 *Caroli*, upon a Debate between the Two Houſes, upon the Petition of Right; it is in *Ruſhworth*'s Collections, Firſt Part, as it was deliver'd by Mr. *Glanvill*, in a full Committee of both Houſes of Parliament, 23. *May* 1628. in the Painted Chamber: and that what he ſays as to this matter, may not paſs for the ſingle Opinion of Mr. *Glanvill*, (tho he was a Learned Man) he in the preſence of the Commons, addreſſes himſelf to the Lords in theſe words, p. 571. *Having thus reduced to your Lordſhips Memory the effects of your own Reaſons; I will now with your Lordſhips favour, come to the points of our Reply, wherein I moſt humbly beſeech your Lordſhips, to weigh the Reaſons which I ſhall preſent, not as the ſenſe of my ſelf, the weakeſt Member of our Houſe, but as the genuine and true ſenſe of the whole Houſe of Commons, conceived in a buſineſs debated there with the greateſt Gravity and Solemnity, with the greateſt concurrence of Opinions, and Unanimity that ever was in any buſineſs maturely agitated in that Houſe.* And then coming to ſpeak of the Point in queſtion, he delivers the ſenſe of the Commons in theſe

Words: *There is a Truſt inſeparably repoſed in the perſons of the Kings of* England, *but that Truſt is regulated by Law; for example, when Statutes are made to prohibit things not* mala in ſe, *but only* mala quia prohibita, *under certain forfeitures and penalties to accrue to the King, and to the Informers that ſhall ſue for the breach of them: the Commons muſt, and ever will acknowledge a Regal and Soveraign Prerogative in the King, touching ſuch Statutes, that it is in his Majeſties abſolute and undoubted Power, to grant Diſpenſations to particular perſons, with the Clauſes of* non obſtante, *to do as they might have done before thoſe Statutes, wherein his Majeſty conferring Grace and Favour upon ſome, doth not do wrong to others; but there is a difference between thoſe Statutes and the Laws and Statutes whereon the Petition is grounded: By thoſe Statutes the Subject has no Intereſt in the Penalties, which are all the Fruit ſuch Statutes can produce (that is, to ſuch Informer) until by Suit or Information commenc'd, he become intitled to the particular Forfeitures; whereas the Laws and Statutes mentioned in our Petition, are of another Nature; there ſhall your Lordſhips find us to rely upon the good old Statute called* Magna Charta, *which declareth and confirmeth the ancient Common Laws of the Liberties of* England. *There ſhall your Lordſhips alſo find us to inſiſt upon divers other moſt material Statutes, made in the time of King* Edward *III. and King* Edward *IV. and*

other

other famous Kings, for explanation and ratification of the Lawful Rights and Privileges belonging to the Subjects of this Realm: Laws not inflicting Penalties upon Offenders in malis prohibitis, *but Laws declarative or positive, conferring or confirming* ipso facto, *an inherent Right and Interest of Liberty and Freedom in the Subjects of this Realm, as their Birthrights and Inheritances descendible to their Heirs and Posterity: Statutes incorporate into the Body of the Common Law, over which (with reverence be it spoken) there is no trust in the Kings Sovereign Power or Prerogative Royal to enable him to Dispense with them, or to take from his Subjects that Birthright or Inheritance which they have in their Liberties, by virtue of the Common Law and of these Statutes.*

I have the rather cited this at large, because it is a clear acknowledgment of the Kings Dispensing Power in as large a manner as we have adjudged it, and does at the same time vindicate it from one of the most clamorous, the most malicious, but withal, the weakest Objections that ever was made against it. By this Judgment say they, you have cancell'd allour Laws,and given up our Lives, Liberties, and Estates, to be disposed of at the Kings pleasure. It is plain, that this is no Consequence at all; for the Commons here in Parliament, at the same time that they expressly grant that the King has undoubted Power of Dispensing with

Laws prohibiting things that are not *mala in se*, but only *mala quia prohibita*, Laws that are made, as my Lord *Vaughan* expresses it, *pro bono populi complicati*; yet they utterly deny, as they had good reason to do, that the King can Dispense with one tittle of *Magna Charta*, or any of those other Laws whereby the Lives, the Liberties, the Interests of any of the Subjects are conferr'd upon, or confirm'd to them; for these are Laws *pro bono singulorum Populi*, which the King never can Dispense with. And as to this matter, I do not know whether it will be proper, but any man so sensibly touch'd in his Reputation, may be provok'd to commit some Indecencies. I must appeal to all men that have observed my Actions and Behaviour since I have had the Honor to sit upon the Bench, whether I use to be guilty, in Laws of this kind, to strain the Construction of them for the Kings Interest. First, in such Laws wherein the Lives of men have been concerned, I confess, I have been scrupulous even to a Fault; for in some Cases upon Statutes that had been adjudged Felony by wiser and better Judges than my self, and it was highly for the Kings service they should be so, yet I could never give Judgment of Death, because I could not satisfie my own Conscience that those Statutes were now in force. And in other Cases wherein the Rights of the Subjects have been brought in

 question,

queſtion, how ſtrictly I have kept to that ſubſtantial difference taken by the *Houſe of Commons*, that though the King in Laws of Government, in Penal Laws of a publick nature, has a power to Diſpenſe in particular Caſes; yet he cannot Diſpenſe with Laws which veſt any the leaſt right or property in any of his Subjects; will appear by the Opinion I gave in the Caſe of *Magdalen Colledge*, (for the truth of which, I appeal to all that know any thing of the Tranſactions in that Caſe) wherein, when the Kings Right againſt the Colledge, was endeavour'd to be aſſerted by a Diſpenſation granted by himſelf, I utterly denied that Diſpenſation to be of any force at all, becauſe there was a particular Right and Intereſt veſted in the Members of that Colledge, as there is in the Members of many other Corporations, of Chooſing their own Head. So far have I been from giving up all Mens Lives, Liberties and Properties to the *Kings pleaſure*.

I had forgot to take notice of two or three Objections more that are uſually made.

Obj. Firſt, here is a Diſability, and the King cannot diſpenſe with a Diſability. As the Statute againſt buying Offices, the King, ſay they, cannot Diſpenſe with, for that reaſon.

Anſw. There is the ſame Diſability in the caſe of Sheriffs, and yet reſolved that the King can Di-

ſpenſe

ſpenſe in that Caſe, and the reaſon in the Statute of buying Offices, or ſitting in Parliament without taking the Oaths, is becauſe there is a Diſability actually incurr'd, and when any perſon is actually diſabled, he cannot have his diſability taken off but by Act of Parliament. But in the Statute diſpens'd with, in the Caſe of Sir *E. Hales*, there is no Diſability actually laid upon any man; but certain things are required to be done, and as a penalty for diſobeying the Act, and omitting the doing thoſe things required by it, the Diſability with the other Forfeitures are to be incurr'd after Conviction. Now the nature of Diſpenſations being, as was ſhewed before, to make the thing Lawful to him that has it, which is unlawful to every body elſe; it does plainly prevent the committing any offence by that perſon, and conſequently the incurring any Penalty or Diſability at all. But in the caſe of buying Offices the perſon is diſabled before the Diſpenſation comes, for he is diſabled *ipſo facto* by contracting or dealing for the Office. So the true difference between the Caſe of Sheriffs, and the Caſe of buying Offices is this, *That the King in the one Caſe can prevent the incurring a Diſability, but cannot purge it in the other after it is incurr'd.* To illuſtrate this by a Caſe of the like nature, *The King may prevent an Attainder, but he cannot purge an Attainder.* If a Man has committed Treaſon

or

or Felony, *the King by granting his Pardon may infallibly prevent the Offenders ever being Attainted, but after he is once actually Attainted, the King can by no means take off that Attainder, or purge the Corruption of Blood, but by Act of Parliament; provided the Judgement by which he is Attainted be not Erroneous.*

Obj. But it is Objected, that these Laws were made for the Interest of Religion, and all Offences against Religion are *mala in se*, and therefore not to be Dispensed with.

Answ. I Answer that true it is, all Offences that are directly against Religion, and as it is Constituted such by the Divine Law, are *mala in se*, and not to be Dispensed with; and in this Case the Parliament is bound as well as the King; for an Act of Parliament made against Religion in that sence is utterly void, as is instanced in *Doctor* and *Student*, of an Act, *That should forbid the giving of Alms upon any occasion*, &c. But Humane and Politick Constitutions, though made for the Interest of Religion, as they had a beginning, so they are alterable by the same power that made them; and therefore the breaches of them are in their nature *mala prohibita*, as was Resolved in the great Case of Dispensations, in 11 *H.* 7. above cited, and instances given; *as the King may dispense with a Priests holding of two Benefices*: though the Laws against Pluralities were made for the Interest of Religion,

ligion, and the better Edification of the people. *So the King may diſpenſe with a Baſtards entring into Prieſts Orders*, &c. Theſe inſtances are taken for Law in that *Year-Book*.

But to all this I know it is ſaid, that theſe high Truſts and Prerogatives might be always ſafe, and ſometimes uſeful, in a *Proteſtant* Princes hands, who would faithfully diſcharge the duty of one that ought to be *Cuſtos utriuſque tabulæ*; but when theſe Prerogatives are aſſerted to a Prince who is of a contrary Religion to that Eſtabliſh'd by Law, there would be always danger of their being abuſed to the prejudice or deſtruction of the Eſtabliſh'd Religion.

To which I anſwer, that it cannot be forgotten that the Promoters of the *Bill of Excluſion* uſed the ſame Argument: If you leave him King, ſay they, he will have all the Prerogatives of a King, and thoſe Prerogatives may be made inſtrumental to the ruin of your Religion; which could not be denied by the Gentlemen on the other ſide, who oppos'd that Bill. Their only Reply was, *Fiat Juſtitia ruat Cœlum*, it is his right, and we muſt not do evil that good may come; we muſt not do wrong, no not to promote the Intereſts of Religion its ſelf. The ſame Argument that weigh'd with them to aſſert the right of Succeſſion to the Crown of *England*, and conſequently to all the Pre-

Prerogatives together, was the Rule we had to guide us in giving Judgment in this Case concerning a particular branch of them. We must not break our Oath, nor give Judgment contrary to what seem'd to us to be Law, let the Consequence be what it will.

But it has been farther Objected to me, by some of my Friends, that, though I could not in Conscience have given Judgment against the King, being of the Opinion that I was, yet I should rather have parted with my Place, than to have given a Judgment even according to Law, which might be so prejudicial to that Excellent Religion that I profess; and of which when I cease to be, let me cease to be at all.

I Answer that neither in Prudence nor in Conscience I could have taken that course.

First, Not in Prudence; for I confess, that saying, *Omnia dat qui Justa negat*; had great weight with me in the Case, and that I was of opinion since an incroachment of Jurisdiction was fear'd, there could not be a greater, nor more dangerous provocation to it, than for Protestant Judges to refuse to give Judgment for a Prince of a different perswasion, in that which we could not deny to be his Right.

And next in Conſcience, I could not decline giving Judgment in this Caſe; for by our Oaths we are as much obliged to give Judgment one way or other, as we are to give what we think a righteous Judgment in all Caſes that come before us.

It hath been Objected that all this was a Contrivance, an Informer ſet up, and all but a feign'd Action.

As to this matter, I can truly ſay that I don't remember that I ever heard of this Action, till after it was actually brought: but in this there ſeems to be no hurt or inconvenience at all. The Law is as well tryed, and ſettled in a Feigned Action, as in a True. There are Feigned Actions directed every day out of *Chancery*, to this very purpoſe, that great and difficult Points of Law may be ſettled by them; and why the King might not direct ſuch an Action to be brought, to ſatisfie himſelf whether he had ſuch a Power, and if he had, that the people might be ſatisfied, and acquieſce in it; I confeſs I ſee no difference at all. If there were indirect means uſed for procuring Opinions, or the like, I have nothing to ſay to it. I ſtand upon my Innocence, and challenge all the World to lay any thing of that kind to my charge. My part was only to give my own Opinion, in which, if either by miſunderſtanding

ing the Books that I have cited, or by drawing weak Concluſions from them, I have erred in the Judgement that I gave; how can I for this be charged as a Criminal? The Law neither ſuppoſes, nor requires an Infallibility in any of his Majeſties Courts of Juſtice; it were very uneaſie Sitting in them, if it did. We can but judge according to the Books that lie before us, and according to the meaſure of our underſtanding of thoſe Books: we have not always ſo much light to guide us, as we thought we had in this Caſe. We often meet with Caſes new and rare, and very ill ſettled by former Judgments, where we are forced to dig Truth as it were out of the Mine; to compare and diſtinguiſh, to skreen and ſift, and gather the ſence of the Law out of the confuſion of diſagreeing, and very often contradictory Opinions, as well as we can; and if after all our Labour and our Pains, we happen to be miſtaken, it was never yet imputed as a Crime. The Judgment is Reverſed in a Writ of Error, not only without any Accuſation, but without the leaſt Reflection upon him that gave it. Nor can a miſtake in Judgment be more Criminal in a matter of a greater Concernment, than it is in matters of the leaſt Conſequence. It would be very miſchievous, and very dangerous if it ſhould: for if in queſtions of Prerogative,

any miſtake ſhall be made Capital on the one hand, when Judgment is given for the King; why ſucceeding Princes may not be as angry at any miſtakes on the other hand, I cannot imagine. And when once affairs are come to that paſs, there will be great encouragement for any Man, that can make the leaſt ſhift to live without it, to undertake thoſe very neceſſary, but very difficult, and very troubleſom Imploiments; great freedom for Men to give Judgment according to their Opinion, and their Conſcience, and great reliance upon the reſolutions of thoſe, who know they ſhall be ſure to pay with their Lives and Fortunes, for any miſtake of theirs, either to the King or the People, as either of them ſhall happen to get the upper Hand. For my own part I thank God I can ſay theſe two things: Firſt, That for theſe ten years together, wherein (with very little intermiſſion) I have Sate a Judge in ſeveral Courts, though I may be juſtly accuſed of many weakneſſes and miſtakes, yet I have never given Judgment in any one Caſe againſt the clear Dictates of my Reaſon and my Conſcience. And the ſecond thing is, That I never gave Judgment in any controverted Point, wherein I had ſo many, and ſo great Authorities to warrant it; as I have to warrant that Judgment which was given in Sir *Edw. Hales* his Caſe. And this

this I ſay, not to ſet up that Opinion again in a Pamphlet, which was ſo ill reliſhed in a Court of Juſtice, nor to oppoſe my Sence to the Judgment of the Nation; for I think it is very fit that this dark Learning, as my Lord *Vaughan* calls it, of *Diſpenſations*, ſhould receive ſome Light from a determination in Parliament, that Judges for the time to come, may Judge by more certain Rules, which Acts of Parliament the King may, and which he may not Diſpenſe with; but I have cited thoſe Authorities at this time in my own Defence, and for theſe particular purpoſes: in the firſt place, to ſhew,

1. That we are not the firſt Inventers of this Diſpenſing Power, but that it has been allowed without Controverſie, to the Kings of *England* in all Ages, that they might Diſpenſe with many Acts of Parliament.

2. That if our Judgment was erroneous, and that the King could not Diſpenſe with that Act of Parliament, yet that Error was but an Error in that ſingle Caſe, and had no ſuch large and miſchievous Conſequences as is pretended. For that, becauſe we Judged that the King could Diſpenſe with that Statute, for others to conclude from thence, that therefore he had a Power to Diſpenſe with all other Statutes, eſpecially ſuch as confer or veſt in any of the Subjects any manner

ner of Intereſt whatſoever, in their Lives, Liberties, or Eſtates; or that, becauſe the King may Diſpenſe with a Penal Law, wherein a diſability is annexed to the breach of it as a Penalty, and that Penalty not to be incurred before a Legal Conviction, and where the Kings Diſpenſation makes the thing Diſpenſed with Lawful, and conſequently prevents any Conviction or Penalty at all: for others to conclude from thence, that therefore the King may Diſpenſe with ſuch Statutes, where a precedent diſability is actually laid upon any Man, as there is upon the Members of both Houſes, till they have taken the Oaths and Teſts preſcribed, and therefore without queſtion is not in the Kings power to Diſpenſe: I ſay, theſe are Conſequences which may flow from the heated imaginations of angry Men, but have no warrant or foundation at all, from the Judgment given by us.

I have one thing more to ſay in my Juſtification, which is, that if I have been guilty of ſo hainous Offences as I am accuſed of, where is the Temptation or the Reward? If it was to keep in my Judges Place, which otherwiſe I might have loſt; I can only anſwer, that if that were the Caſe, I then became the worſt Man in the World, only to keep that, which, it is pretty well known, I was with much difficulty, by the per-

perſuaſion of my Friends, prevailed with to accept: and for any other Reward, whoever is acquainted with the circumſtances of my Fortune, will, I am confident, notwithſtanding the falſe and idle reports, of I know not what great Reverſions lately fallen to me, as eaſily acquit me of having been corrupted by the King, to give a pernicious Judgment in this Caſe, as of having enriched my ſelf by taking Bribes in Caſes between party and party.

All that I have to add more, is, that howſoever this that I have ſaid in my Defence, may happen to be underſtood at preſent: yet I could not deny my ſelf the ſatisfaction of having put in a Plea of Innocence at leaſt; that whatſoever ſhall happen to me now, may perhaps meet with a more equal Judgment in after-times, ſince it ought to be much leſs uneaſie to me to loſe my Life, if any body be very fond of taking it, than to let the aſperſions that are every day caſt upon me, to paſs in ſilence, or ſuffer my ſelf to be tranſmitted to Poſterity, under the Character of a Betrayer of my Religion, or a Subverter of the Laws and Liberties of my Country.

FINIS.

Page 3. Line 2. read *and after.*